A

POH YANG HONG

v.

NG LAI YIN & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: S4-21-191-2008]
17 SEPTEMBER 2010
[2010] CLJ JT(3)

C

PUBLIC AUTHORITIES: *Registrar of Land Titles - Breach of statutory duty - Negligence - Search certificate, issuance of - Search result certified fraudster as registered proprietor of land - Whether Registrar liable to purchaser thereof - Whether to compensate purchaser - Whether entitled*
D *to any statutory protection - National Land Code, ss. 22, 386*

LAND LAW: *Sale of land - Registrar of Land Titles - Search certificate, issuance of - Search result certified fraudster as registered proprietor of land - Whether Registrar liable to purchaser thereof - Whether to compensate*
E *purchaser - Whether entitled to any statutory protection - National Land Code, ss. 22, 386*

CIVIL PROCEDURE: *Summary application - Purchase of land - Registrar of Land Titles - Search certificate, issuance of - Search result certified fraudster as registered proprietor of land - Claim for compensation*
F *for loss of purchase price - Whether Registrar liable - Whether suitable case for summary disposal - Rules of the High Court 1980, O. 14A - National Land Code, ss. 22, 386*

The plaintiff had sought to purchase a piece of land from the first
G defendant and, having obtained an official search certificate from the second defendant (Registrar of Land Titles, Kuala Lumpur) indicating that the first defendant was the registered proprietor of the land, paid the first defendant RM4,451,160 for the property. Subsequently, following a third party's claim of ownership over the
H land, the plaintiff conducted a second search with the second defendant and discovered that the subject land had actually belonged to one Mohamad Nor, and not the first defendant. The plaintiff alleged that the second defendant (and the third defendant Government of Malaysia, vicariously) were in breach of statutory
I duty and negligent in failing to keep a true and proper register of land titles and – invoking the summary procedure of O. 14A Rules

of the High Court 1980 ('RHC') – posed seven questions of law for the court's summary determination and applied for compensation of the purchase price as per the requirement of s. 386 National Land Code ('NLC'). The second and third defendants sought the protection and immunity as ostensibly accorded them by s. 22 of the NLC, and in any case argued that the claim ought not to be summarily entertained as the second and third defendants had raised the question of fraud thereby necessitating a full trial of the claim.

Held (allowing application and ordering full compensation for plaintiff):

(1) It is the duty of the Registrar of Land Titles to ensure and maintain a system of land registration that is accurate, reliable and trustworthy so that the public do not have to go behind the title to find out how a registered owner has become the registered owner. This was indeed the whole purpose of the Torrens System of land registration. (para 15)

(2) There must have been some hanky-panky involving the first defendant and staff of the second and third defendants who were responsible for the actions of these nefarious elements within the land office. This was something that was perpetrated with the help of people inside the land office itself. The second defendant could not run away from the fact that it happened in their very office, right under their nose and eyes. (para 11)

(3) It is not open for the second defendant to take shelter under s. 22 of the NLC. It would defy logic if the second defendant could absolve themselves of liability and responsibility under the 'good faith' protection therein, when two official searches on the same piece of land had yielded two different results as to who the registered owner was. (paras 12 & 13)

(4) No legislation is promulgated for a decorative purpose and effect must therefore be given to s. 386 of the NLC. Further, the 'bug must stop there' for otherwise public servants would never be accountable for the misdeeds of those under their charge (*Ministry of Housing and Local Government v. Sharp and Another* (foll)). (paras 16, 17 & 21)

(5) There is no merit in the argument that this summary procedure is unsuitable or that evidence ought to be led in a trial before liability is established. The official searches here emanated from

A the same land office, and how this could have happened is something that the second and third defendants ought to find out through their own internal inquiry or police reports or through reports to the Malaysian Anti-Corruption Commission. They do not need a civil trial to establish that. In any case, a
B full blown trial would embarrass those public servants charged with preserving the integrity in the system of land registration and searches. Likewise, there is no reason for the plaintiff to wait much longer for what he had lost after relying on the official land search result. (para 23)

C

(6) The court is more than satisfied that the plaintiff's claim could be disposed of by answering the questions posed in his favour. The second and third defendants had clearly breached their statutory duty and had also been negligent. Hence,
D compensation as prayed for in the statement of claim equivalent to the full purchase price of the property of RM4,451,160 ought to be paid by the second and third defendants to the plaintiff (together with interests and costs). (paras 25-27)

Case(s) referred to:

E *Ministry of Housing and Local Government v. Sharp and Another [1970] 2 QB 223* ***(foll)***

Pendaftar and Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. K S South Motor Sdn Bhd [2000] 2 CLJ 573 CA ***(foll)***

Petroleum Nasional Bhd v. Kerajaan Negeri Trengganu [2003] 4 CLJ 337 CA
F ***(foll)***

Legislation referred to:

National Land Code, ss. 22, 386

Rules of the High Court 1980, O. 14A

G *For the plaintiff - N Chandran; M/s Albar & Partners*

For the defendants - Roslan Abu Bakar SFC; AG's Chambers

Reported by Wan Sharif Wan Ahmad

H

JUDGMENT

Lee Swee Seng JC:

Prologue

I

[1] The revelation in this case is both startling and shocking, symptomatic of something sordid simmering beneath the semblance of stately system and security. It epitomizes the reality that no

human system is perfect nor can it be fully relied upon. Yet life as we know it would be impossible if one cannot trust the provider of public service, in this case the Registrar of Land Titles, with respect to the integrity of land search results and the system of land registration. It is a basic premise in the Torrens System of land registration that the mirror principle applies – whatever is reflected in an official search on the register document of title in the land registry would be what is also reflected in the issue document of title in the possession of the registered land owner.

Problem

[2] The plaintiff here in his affidavit in support of his application under O. 14A Rules of the High Court (RHC) had disclosed that he made a land search on a piece of land identified as Geran 232, Lot 349, Seksyen 71, Bandar Kuala Lumpur, Wilayah Persekutuan. His search and an official one at that with the 2nd defendant revealed that the 1st defendant is the owner of the land in question.

[3] The plaintiff after paying the full purchase price went to the land and saw a Malay person who asked, "What are you doing on my land?" to which he answered "I have just bought the land." "I didn't sell my land to anyone," was the retort of Encik Mohamad Nor bin Mohamad.

[4] Panic, the plaintiff rushed back to do another search and this time, sure enough, the said same piece of land, does belong to Encik Mohamad Nor bin Mohamad!

Problem

[5] By that time the 1st defendant having received the full purchase price, could not be contacted. The plaintiff through his solicitors sued the 1st defendant for damages for fraud and the 2nd and 3rd defendants for damages for breach of statutory duty and negligence. The writ and statement of claim was served on the 1st defendant and no appearance having being entered, a judgment in default was taken against the 1st defendant.

[6] As for the 2nd and 3rd defendants, they deny that they are liable and relied on the immunity and protection afforded the 2nd defendant under s. 22 of the National Land Code 1965 (NLC). The 3rd defendant's liability would only arise if the liability of the 2nd defendant is established.

A **Prayers**

[7] The plaintiff through his counsel Datuk N Chandran felt that this was a matter amenable for determination and disposal under O. 14A RHC. A few questions of law were formulated but they all
B hinged on this one question: Whether the undisputed facts go towards establishing a breach of statutory duty on the part of the 2nd and 3rd defendants and in consequence, a case of negligence of their part to keep a true and proper register of land titles as registered in the Registry of Land Titles Wilayah Persekutuan.

C **[8]** The questions of law posed are as follows:

Proposed Questions For The Determination Of The Court Pursuant To Order 14A Rule 1 Of The Rules Of The High Court 1980

D

1. Whether upon the facts as averred to or as alleged in paras. 7, 8, 15, 16, 17, 18, 40, 41, 42, 43, 44, 45, 48, 49, 50 and 52 of the statement of claim and the defences as raised by the 2nd and 3rd defendants in paras. 13, 14, 18, 19, 20, 21, 22, and 23
E of the defence of 2nd and 3rd defendants, the 2nd defendant is in clear breach of its statutory duties under the National Land Code 1965, and/or the Rules made pursuant thereto, and are of relevance to the facts of the matter herein?

F 2. Whether upon the facts as averred to or an alleged in paras. 7, 8, 15, 16, 17, 18, 40, 41, 42, 43, 44, 45, 48, 49, 50 and 52 of the statement of claim and the defences as raised by the 2nd and 3rd defendants in paras. 13, 14, 18, 19, 20, 21, 22, and 23 of the defence of 2nd and 3rd defendants, the 2nd defendant is
G negligent in and about the performance of its statutory duty in the maintenance of the records of particulars of lands as registered with the Land Registry Wilayah Persekutuan, Kuala Lumpur, including the land, which is the subject matter of the suit herein?

H 3. Whether in the circumstances and on the facts of the matter herein, including the facts as documented, and given the relationship as between the 2nd and the 3rd defendants, the 3rd defendants is vicariously liable for the acts, deeds or misdeeds of the 2nd defendant, Constituting a breach of the 2nd
I defendant's statutory duty and/or negligence, in and about the

manner in which the 2nd defendant had maintained the records of particulars of the subject land, with the Land Registry Wilayah Persekutuan, Kuala Lumpur? A

4. Whether the plea of fraudulent title and the fraud of any third party as alluded in para. 18 and 19 of the defence of the 2nd and 3rd defendants, can constitute a defence on totality of the facts of the matter herein and thereby in law to the 2nd and 3rd defendants? B

5. Whether on the particulars of the searches conducted at the Registry of Land Titles Wilayah Persekutuan, Kuala Lumpur on 18 September 2007, 3 June 2008 and 4 June 2008 adverted to in statement of claim in the matter herein, and the particulars of which are clear and indisputable, the 2nd defendant is in clear breach of its duty and in consequence negligent, as alleged in the statement of claim, in law and for which the 3rd defendant is clearly vicariously liable? C D

6. Whether by reason of the 2nd defendant's clear breach of its duty, and negligence, the 2nd defendant is liable on the plaintiff's claim and whether by reason of the 2nd defendant's said liability, the 3rd defendant is vicariously liable on the plaintiff's claim as against it? E

7. Whether the damages to be awarded to the plaintiff, if the answer to question 1-6 above be in the affirmative, will be the loss as sustained by the plaintiff in terms of the monies as paid by the plaintiff as per the sale and Purchase Agreement of 8 October 2007, the interest and other expenses as related to the loan as available of the plaintiff from HSBC Bank Malaysia Berhad, if such damages ought to be ordered to be assessed and paid by the 2nd and 3rd defendants to the plaintiff? F G

Principle

[9] The plaintiff's counsel took the view that on the pleadings as they are before this court, including the amended defence of the 2nd and 3rd defendants and the express admissions made in the amended defence that this was a matter where this court can proceed to determine upon and rule on the questions posed to this court as per the Appendix to the plaintiff's application. H I

[10] As authority for his proposition the plaintiff's counsel referred to the Court of Appeal decision in *Pendaftar and Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. K S South Motor Sdn Bhd* [2002] 2 CLJ 573 where Siti Norma Yaakob JCA (as she then was) at pp. 583 and 584 propounded with profound logic the problem of false and fabricated files of motor vehicles at the JPJ and the need to shoulder the responsibility for the fiasco created:

> … The impression that is created in our minds is that the registries of the first and second appellants have been penetrated into by person or persons unknown and particular files have been removed and replaced or substituted with fabricated ones. This unauthorized intrusion can only happen with the assistance of officers in the employment of the first and second appellants. On the facts of this case this is the inescapable conclusion that we have reached as by no other means can any file maintained in the manner as made out by the first and second appellants, be reported missing or substituted.
>
> Both the first and second appellants had the absolute control of the day-to-day management of their respective registries and the fact that files had gone missing is proof enough that there had been lack of supervision on the part of the first and second appellants and that omission we say points to there being lack of due diligence in the management and running of the two registries.

[11] Transposing the above observation to the Registry of Land Titles context, one does not have to be a genius to surmise that whatever is the risk management system with respect to the computerized system now in place for land registration and searches, there must have been some hanky-panky involving the 1st defendant and staff of the 2nd and 3rd defendants who are responsible for the actions of these nefarious elements within the land office. It is something perpetrated with the help of people inside the land office. The 2nd defendant cannot run away from the fact that it happened in their very office, right under their very nose and eyes!

[12] It is not for the 2nd defendant to take shelter in and shield themselves under s. 22 of the NLC from civil claims and say:

> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, performance of any duty, conferred or imposed on him by or under this Act.

[13] It defies any logic how the 2nd defendant could have absolved themselves of liability and responsibility under the 'good faith' protection when two searches on the same piece of land had yielded two different results with respect to who is the registered owner. It might have been different if it had been a manual search done by a clerk of the purchaser solicitor's firm in collusion with the staff in the land office. Here it was an official search bearing the seal of the Land Office for both searches.

[14] There must be a place for public accountability of a public authority and they cannot immunize themselves in any and every situation when through the actions of their staff fraud is being perpetrated. Tax payers pay for their salary and registration fees and land search fees are charged for services rendered. If so for motor vehicle system of registration, more so for the system of land registration under the Torrens System for the title is everything.

[15] It is the duty of the Registrar of Land Titles to ensure and maintain a system of land registration that is accurate, reliable and trustworthy so that the public that deals with it has the confidence that they do not have to go behind the title to find out how the registered owner has become the registered owner. This was the whole purpose of the Torrens System of land registration hailed for its simplicity and indeed profundity in simplicity. It could not be in the intended exercise of its powers and performance of its duty to have yielded two different results for two different searches on the same piece of land.

[16] Effect must be given to s. 386 of the NLC for no provision of any piece of legislation is there for decorative purpose but they are there, designed for dealing with the decadence of fallen humanity and deficiencies in humanly created system that may lead to another member of the public suffering as a result. Section 386 of the NLC reads:

> Any purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage by reason of any error in, omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of section 434.

[17] The bug stops here is an adage we do well to abide by, otherwise public servants will never be accountable for the misdeeds of those under them. In a UK Court of Appeal case of the *Ministry*

of Housing and Local Government v. Sharp and Another [1970] 2 QB 223, a careless clerk in a local land registry issued, on request, an official certificate to would-be purchaser of a piece of land that the land was free from any charge when in fact the Ministry of Housing and Local Government had already registered a charge two years earlier. The purchasers completed the sale, based on the certificate. As the Ministry could not claim the benefit of the charge from the purchasers, they sued the registrar of the land registry and the local council on the ground that they were responsible for the mistake of the clerk.

[18] The Court of Appeal at p. 265 of the report states clearly and cogently as follows:

> The fundamental obligation of the registrar is to keep the register, and in return he receives the prescribed fees. He must enter in the register every charge which is duly submitted to him. He must allow any person to search the register: and if asked, he must make an official search and issue an official certificate setting forth the result.
>
> The object of the register is to provide security for two classes of people, encumbrancers and purchasers.
>
> By requiring a search, a purchaser is entitled to know exactly that charges encumber the land, and to adjust his price accordingly. If the registrar issues an official certificate, showing the land to be clear of any charge, that is conclusive in favour of the purchaser.

[19] It is interesting that the Malay word for 'responsibility' is 'tanggung-jawab' which carries with it the meaning of 'bearing the burden of answering and accounting'. The public has a reasonable expectation that public servants will do and be just that as are those in private sector.

[20] The Court of Appeal at p. 226 went on to reason on the rationale and recount the rudiments of being responsible for one's actions:

> He must answer for the mistakes of the clerk and make for the loss. He is a public servant and comes within the settled principle of English Law that when an official duty is laid on a public officer, by statute or common law, then he is personally responsible for seeing that the duty is carried out. He more and often does get a clerk or a minor official to do the duty for him, but if so, he is

> answerable for the transgression of the subordinate. Sometimes it is an absolute duty, in which case he must see that it is performed absolutely. At other times it is only a duty to use due diligence in which case he must see that due diligence is used. But, in any event, if the duty is broken, and injury done thereby to one of the public, then the public officer is answerable. The injured person can sue him in the civil courts for compensation … By law he is responsible. He will, of course, if he is wise, insure himself against his liability: or get the Government to stand by him. But liable he is to the person injured.

[21] I would say that the standard of responsibility and accountability of public servants in Malaysia is no different.

[22] The learned Senior Federal Counsel Encik Roslan Abu Bakar had submitted that this summary procedure is not suitable for determination of liability for breach of statutory duty and negligence because the 2nd and 3rd defendants in their defence had made reference to a possible fraud being committed which led to the records being falsified. He said then that this is a case for which evidence must be led in a trial before liability is established.

[23] I find it hard to follow that argument. What is not in dispute is the fact that the two official searches emanated from the same land office. How this could have happened is something that the 2nd and 3rd defendants should be dying to know through their own internal inquiry and through police reports and MACC reports that they should have made. If they need a civil trial to establish that then they are sadly mistaken. Indeed criminal charges should have been preferred against those responsible otherwise the same scam will surface again after a respite. The SFC had not informed this court of any progress with respect to bringing to book those responsible. Indeed a full-blown trial would only embarrass the public servants charged with preserving the integrity in the system of land registration and searches and might even further expose their vulnerability. Why should the plaintiff suffer to wait any longer for what he had lost through relying on the accuracy and authenticity of the official land search result.

[24] On the applicability of O. 14A RHC to a simple and straightforward matter devoid of dispute over material facts that no parties can run away from, the Court of Appeal in *Petroleum Nasional Bhd v. Kerajaan Negeri Trengganu* [2004] 4 CLJ 337 at p. 364 said:

A In our view, even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O. 14A and O. 33 r. 2 in relation to the questions of law posed which are clear and definite and the issues clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then apply the relevant rules to the facts as found.

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Pronouncement

C **[25]** Based on the above test I am more than satisfied that the plaintiff's claim can be disposed of by answering the questions posed which questions are based on the simple and straight-forward substratum of facts not in dispute.

D **[26]** The answers to the question posed are as follows:

1. Yes
2. Yes
3. Yes

E

4. No defence
5. Yes

F

6. Yes

Question 7 had been withdrawn by plaintiff's counsel.

[27] I find that the 2nd and 3rd defendants have breached their statutory duty and have been negligent and that compensation as G prayed for in the statement of claim equivalent to the full purchase price of the property that he had paid which is the sum of RM4,451,160 be paid by the 2nd and 3rd defendants to the plaintiff together with interests at the rate of 8% per annum from date of decision 27 July 2010 until the date of realization and costs of H RM15,000.

Postscript

[28] Out of curiosity and concern, I had asked the SFC Encik Roslan Abu Bakar as to whether what we see here today is just the I tip of the iceberg. His candid reply was that there are about 9 other cases that he is aware of where the claims are just as substantial. If

that is so, what we see is alarming and regrettable. I have as part of my order requested the police reports lodged by both parties to be forwarded to this court for its record. As what has happened will happen again to the dire loss of innocent members of the public, it is this court's ardent desire that the police and the MACC will investigate the infirmity within the information technology system of the land office that had allowed intruders to invade it and destroy its integrity and that those accountable shall be held responsible.

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